

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Original & Affidavit of Mailing

77-1293

To be argued by:
CHERYL M. SCHWARTZ

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1293

UNITED STATES OF AMERICA,
—against—
STANLEY FORSACK,
Appellee,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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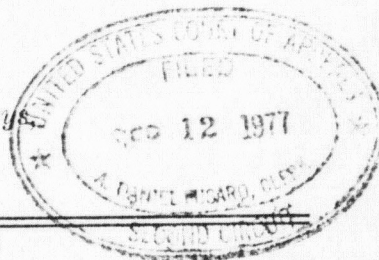


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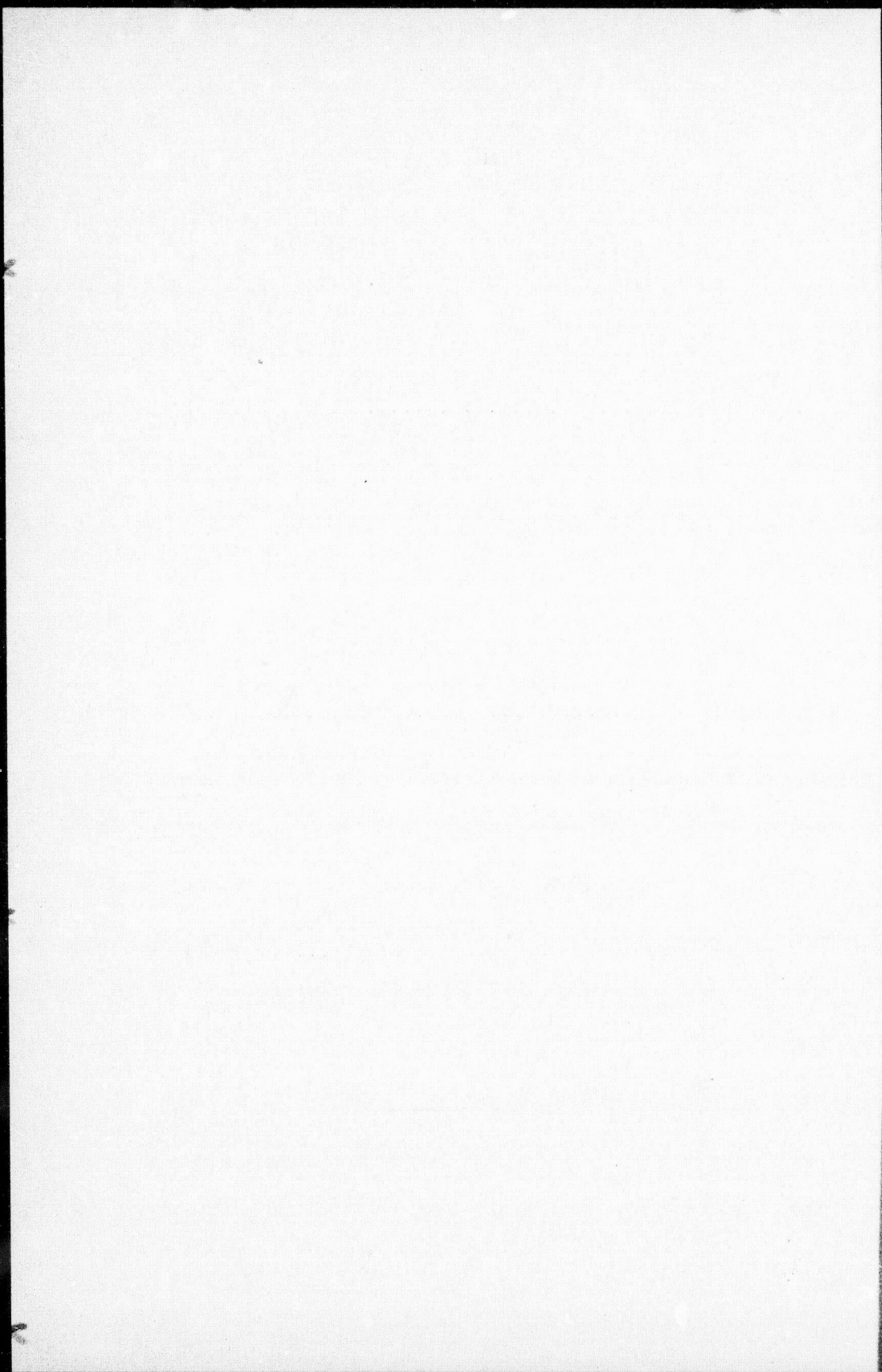
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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1293

UNITED STATES OF AMERICA,

Appellee,

—against—

STANLEY FORSACK,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Stanley Forsack appeals from a judgment of the United States District Court for the Eastern District of New York (Thomas C. Platt, *J.*) entered on May 27, 1977, convicting him, after a jury trial, of engaging in the business of dealing in firearms without a license, in violation of Title 18, United States Code, Section 922 (a) (1). Appellant received a \$5,000 fine and was sentenced to three years imprisonment. He is free on bail pending appeal.

Appellant presents various claims on appeal: (1) that his post-arrest statements were involuntarily made, were the fruits of an illegal arrest, and were obtained in violation of his constitutional rights, (2) that the Government's alleged failure to produce the informant and present his testimony in its direct case deprived appellant of a fair trial, (3) that the Government failed to prove a *prima facie* case, (4) that the court's questioning

of appellant during cross-examination demonstrated its disbelief of his testimony, (5) that the Government's alleged failure to produce certain documents requested by appellant during trial deprived him of a fair trial, and (6) that the evidence was insufficient to support the jury's verdict.

Statement of Facts

A. The Trial

(1) The Government's Case.

On September 29, 1976, Alcohol, Tobacco and Firearms ("ATF") Agent Anthony Rondello, acting in an undercover capacity, and a confidential informant, one Kenneth Wilson, entered the Floral Park Liquor Store, Floral Park, New York, at approximately 12:45 P.M. and met appellant (T. 118).¹ After introducing Agent Rondello as "Tony", the informant asked appellant if he had "the stuff" (T. 119). Appellant discussed two guns which he had for sale. He then left the store and upon his return, led the agent and informant into the back room (T. 119). Once there, he took a .32 caliber Savage automatic pistol from a leather case and gave it to Rondello. When the agent expressed concern that the serial number was still on the gun, appellant assured him that the firearm could not be traced and told him he could grind the number off (T. 119-120). Appellant also showed Rondello a .22 caliber Lama handgun. He then offered the two guns for \$225. However, when Wilson asked if he could do better on the price, appellant agreed to sell the two weapons for \$215 (T. 120). Appellant next

¹ References preceded by the letter "T" are to the consecutively numbered pages of the transcript of the trial and the suppression hearing.

wiped off the guns with a rag and placed them in a bag, which he gave to Rondello (T. 122). While handing over the guns, appellant instructed Rondello to wipe off any prints before he sold the weapons to anyone else (T. 122). He also expressed concern about ATF agents and told Rondello and Wilson that "if this was (sic) a setup, he'd have to blow [their] heads off." (T. 122).

Rondello concluded the transaction by paying for the firearms and asking appellant if he could supply more guns. Appellant replied that he could supply as many .38 caliber revolvers as the agent wanted; he also said that he probably could get an M2 carbine machine gun for about \$400 (T. 120-121). Rondello said he would contact appellant again to purchase additional guns (T. 124).

A week later, on October 6, 1976, Agent Rondello, this time accompanied by ATF Agent Michael Galgano, returned to the liquor store at approximately 10:45 A.M. (T. 124, 187). Rondello introduced Galgano as "Nick" and asked appellant if he had the guns they had previously discussed (T. 124, 188). Appellant asked where Ken, the informant, was, and Rondello replied that Wilson could not make it but that he had told him to go to the store to see what appellant had (T. 125). "Nick" told appellant that he had come to the store to be sure they were getting the right price for the guns and added that the informant "was not around" (T. 188). Obviously apprehensive, appellant stated that if "Tony" and "Nick" were cops, he would have to blow them away (T. 125, 188).

Appellant then took the agents into the back room and showed them a .32 caliber Harrington and Richardson revolver and a .32 caliber Savage semi-automatic pistol (T. 125-126). Appellant said that he wanted \$75 for the guns (T. 126, 189). Rondello handed appellant \$150, but appellant told him that he meant to charge

only \$75 for the two guns, not \$75 apiece, and he returned \$75 to Rondello (T. 166). Agent Galgano asked appellant whether he could get any .22 caliber revolvers. Appellant replied that he could get as many as they wanted; he calculated that they would cost him about \$40 apiece, and he would charge "Nick" and "Tony" \$65 to \$70 (T. 190). He also told the agents that he could supply .32 revolvers for about \$40-\$45 each (T. 126, 190). Appellant further offered to sell a .45 caliber pistol for \$150, stating that if "Tony" and "Nick" did not want it, he would sell it to somebody else (T. 190). Rondello told him he would buy the .45. Finally appellant showed Rondello and Galgano a .357 Colt Python and promised to get one for them for \$200-\$400 (T. 126-127). During this conversation, appellant said that if "Nick" and "Tony" had a license, they could purchase guns "cheaper", because legal guns were less expensive (T. 128, 191). Galgano responded that he had no permit (T. 191).

Appellant then wiped off the .32 caliber Harrington and Richardson revolver and the .32 caliber Savage semi-automatic pistol and told the agents that it would be a good idea for them to do the same thing before selling the weapons (T. 128). Agent Rondello paid for the guns (T. 127), and appellant suggested that the agents return in a week, on October 13th, at about 8:30 A.M., before the store opened (T. 130).

The agents returned on October 13, at about 10:45 A.M. and asked appellant if he had the .45 pistol he had promised them (T. 131, 191). Appellant replied that he did not have it at that time and suggested that Rondello meet him the next evening at the Village Inn, a bar across the street, at about 8:00 P.M. (T. 133, 192). Appellant said he was reluctant to sell guns in the store any longer because he was afraid of getting the owner into trouble (T. 132-133).

Appellant also told Rondello and Galgano about other guns he had available or could supply. After telling the agents that he had two other handguns but that they were promised to another buyer (T. 131), he asked "Nick" and "Tony" if they wanted to buy a .38 caliber revolver, probably a Colt or a Smith and Wesson, and they told him they could use four .38 caliber revolvers. There was also further discussion of the M2 carbine machine gun, which appellant said he would sell for about \$400. Appellant cautioned, however, that he did not want to have to hold on to it for any length of time (T. 131, 192). When the agents asked appellant about the .22 caliber guns they had previously discussed, he suggested that they buy .32 pistols, which were of a better quality. Nevertheless, Rondello and Galgano asked him to get them ten to twelve .22 caliber pistols and four .38 caliber revolvers; appellant assured them that the guns he sold them were not traceable on paper (T. 132).

As agreed, Rondello met appellant at the Village Inn at about 8:00 P.M. on October 14th. The pair left the bar, however, and drove in appellant's car to a parking lot near the railroad tracks, where appellant showed Rondello a .45 caliber semi-automatic pistol (T. 134). Appellant told Rondello it would cost him \$200, which was \$50 higher than the previously quoted price. Appellant explained that he needed to make some money on this sale since he had not made any money on the previous transaction (T. 134). Appellant also told Agent Rondello that he was trying to set up a connection "down South" so that he could deliver guns on a continuing basis. They then drove to Rondello's car, where Rondello paid for the gun. Appellant again instructed Rondello to wipe off the gun with a rag before selling it (T. 135). There then ensued a discussion concerning the quantity and price of the .22 and .38 caliber guns appellant was to supply, and about the M2 machine gun (T. 136). When Rondello asked appellant about the two guns

which he had had the day before, he was told that they had been sold to the buyer to whom they had been promised (T. 137). Before parting company, Rondello and appellant agreed to contact each other in the near future to arrange for further purchases.

ATF Agent Pierce Rogers had conducted surveillance of the four meetings between Rondello and appellant (T. 205, 209, 210-211), and immediately after each purchase, Rondello showed Rogers the guns which he had bought from appellant (T. 206, 210, 211). Through Rogers, the Government established that appellant was not a federally licensed gun dealer (T. 212) and that the five weapons purchased from appellant had been test-fired and found to be operable (T. 213). Rogers also disclosed that Kenneth Wilson had been a registered informant with ATF for about one and one-half years, had received money for expenses only (T. 208) and had no cases pending against him in federal court (T. 209).

Agent Rogers also testified concerning statements made by appellant the day after his arrest in October 1976. On October 28, 1976, as a result of previous discussions between them, appellant came to Rogers' office and agreed to tell Rogers where he had acquired the guns which he had sold to the agents. Appellant stated that he had purchased three of the firearms, two in 1974 and one in October 1976, from a Victor Accedeno in Syracuse, New York. The Colt .45, appellant stated, had been acquired from an unknown person at a Syracuse gun show in October of 1976, while the Lama had been purchased at a sporting goods store in Vermont in 1967. Of the five guns, only one, the Lama, had been purchased legally, appellant confided (T. 215-216).

(2) The Defense Case.

Appellant testified in his own behalf and called other witnesses to corroborate parts of his testimony. He stated that he had had a New York State license to carry

a pistol and to collect guns for 10 years and that he was a member of the National Rifle Association (T. 352-354). He said he owned 46 guns (T. 353).

Appellant stated that he was acquainted with the informant, whom he called "Kenny", because Wilson worked as a clerk at the Floral Park Sporting Goods Store, where appellant purchased pistols (T. 307-308). In August and September, appellant said, Wilson called and asked him if he could purchase a handgun for him. Wilson explained that he could not purchase a gun, and appellant assumed that it was either because he did not have a license or was a known felon (T. 310). At first appellant refused to sell Wilson a gun, but then decided to think about it after Wilson pointed out that his store had done favors for appellant by getting him discontinued production models of firearms (T. 310, 311). Shortly thereafter, in the first week of September, appellant went to a gun show in Schenectady and purchased a Savage pistol for Wilson, which he then sold to him for \$50 (T. 311-313).

Appellant further testified that the next week, Wilson called him and asked him to get a handgun for a fellow clerk at the store, whereupon appellant agreed to sell him, at below market price, one of the guns he already owned (T. 313-314). When Wilson came to the liquor store to pick up the gun, he was accompanied by a fellow named "Tony", a cab driver, instead of the clerk "Joe" whom appellant had expected (T. 315). Wilson explained that "Tony" needed the gun for protection as a cab driver but could not get a license to carry a gun in New York City; appellant then agreed to sell the gun to "Tony" for \$100 (T. 315). Although Wilson and "Tony" asked him if he could sell them more guns, appellant testified that he was reluctant to do so at first (T. 320).

Two days later, appellant had a conversation with Wilson in which he told Wilson that he would be going to

a gun show in Syracuse. Wilson indicated that he would like to buy more guns from appellant and asked him to look for guns for him at the show; Wilson said he planned to give the guns to "Tony" for other cab drivers (T. 321). At the show, appellant purchased a Savage pistol and a Harrington & Richardson revolver for \$75 which he offered to sell to Wilson (T. 322-323). Wilson agreed to pick up the guns at the liquor store, but instead "Tony" and his friend "Nick" came for the guns (T. 323-324). Although he was worried about the fact that Wilson did not accompany them, asking them "how can you settle up with [Kenny]", he nonetheless agreed to sell the guns to them for \$75, the cost to him (T. 324-325). Appellant further testified that although "Nick" and "Tony" expressed interest in buying other guns, including one like his personal .357 caliber handgun, he did not agree to acquire more guns for them (T. 325, 332) and had no guns for sale other than the two he had sold to Galgano and Rondello (T. 333).

Appellant said that on October 11th, Wilson called to ask if he had any more guns for sale. Appellant told Wilson that he had purchased a .45 caliber Colt for which he could not get proper documents and that he would sell it to him for cost, \$175, on October 13th (T. 335-337).

On October 13th, "Tony" and "Nick" came into the liquor store and asked if they could purchase any firearms. They inquired specifically about the .45 caliber gun, but appellant explained that it had been promised to Wilson. Appellant said it was agreed that if Wilson did not want the gun, "Tony" could buy it the next evening. Rondello and appellant agreed to meet at the Village Inn at 8:00 P.M. the next night (T. 338-339).

Appellant testified that on October 14th, at about 7:00 P.M. he visited Wilson at the sporting goods store and asked him if he wanted to buy the gun. Wilson

said that he did not have the \$175 to pay for it, so appellant told Wilson to meet him and "Tony" at the Village Inn to discuss the matter (T. 341-343). At 8:15, "Tony" came in and told appellant that Wilson no longer wanted the .45, and at this point, appellant agreed to sell it to Rondello (T. 343-344). Appellant then drove "Tony" to the railroad station parking lot where he sold him the gun for \$200, representing the \$175 cost to appellant and an "extra \$25 for Kenny" (T. 345). Appellant stated that he then told "Tony" that he did not want to sell any more guns to him and that he later told Wilson the same thing (T. 346-347).

Michael Ruggirro, the owner of the Floral Park Sporting Goods Store, testified that appellant had bought two guns from his store and that Kenneth Wilson had been an employee at the store since 1974 (T. 286-289). Appellant's wife, Marion Forsack, testified that in September and October of 1976, Kenneth Wilson called her husband at home approximately seven times (T. 291).

Appellant also called Wilson as a witness. Mr. Wilson testified that he had known appellant about a year, that he was employed as a clerk at the Floral Park Sporting Goods Store, and that appellant had purchased weapons from the store in September or October 1976 (T. 295-296). He also testified that he had been an ATF informant for about a year, stating that he received expense money in the course of his work for ATF (T. 297-298).

Finally, appellant asked Agent Rogers to produce the evidence logs relating to the guns which had been sold to Agent Rondello. Rogers testified that on September 29, 1976, Agent Rondello gave him the two guns which had been purchased from appellant. After receiving the firearms, Rogers prepared a form, called a Property Report, describing the weapons; he then placed the weapons

into the ATF Evidence Room. Rogers further stated that it was his practice to keep the Property Report in his office. (T. 414-417).

B. The Suppression Hearing

Prior to trial, appellant moved to suppress his statements of October 28th to Agent Rogers. In his motion papers, appellant alleged that his post-arrest statements were made involuntarily and were given under a promise of immunity made by an ATF agent. (Appellant's Appendix, p. 8a). Appellant's papers did not specify in what way his statements were involuntary. Testimony at the suppression hearing revealed the following facts.

On October 26, 1976, Special Agent Rogers obtained a warrant for appellant's arrest, based on appellant's unlicensed sale of firearms to the undercover agents. The warrant was executed the next day at the liquor store in Nassau County where appellant worked (T. 4). After being placed under arrest, appellant was taken to Nassau County police facilities for processing (T. 5-6).² En route, he was shown a copy of the complaint upon which

² Appellant was placed in a police car with Agent Rondello, whom appellant was lead to believe was also being arrested for the sale of the guns (T. 17-19). Rogers testified that ATF did not want Rondello to be identified as an agent at that time (T. 18). Apparently this procedure was used for the safety and protection of the undercover agent. There is no allegation that Agent Rondello used this procedure to encourage appellant to make any statements to him or to Rogers. In fact, appellant made no statements at that stage, nor was he asked to (T. 5-7).

Appellant testified that there was a tape recorder, which he stepped on, in the car with Rondello (T 50). Again, there is no allegation that the tape recorder was misused in any way. In fact, Rogers testified that to his knowledge there was no tape recorder in the car (T. 17).

Although appellant insinuates that the concealment of Rondello's identity and the presence of the tape recorder were unfair, he has failed to articulate how he was harmed, if at all, by these circumstances, especially since he learned from the Assistant U.S. Attorney who spoke with him on the day of his arrest that Rondello was an agent.

the arrest warrant was issued (T. 19) and he was twice given his *Miranda* warnings before the processing (T. 5, 7). He was not questioned about the crime nor did he make any statements (T. 5-6). Appellant was then transported by Agent Rogers and another ATF agent to Brooklyn to be brought before the Eastern District Magistrate (T. 6).

On the way to Brooklyn, Rogers asked appellant if he would cooperate by giving information about the source of the firearms he had sold (T. 6-7). Appellant replied that "he wanted to think about it" and to talk to an attorney (T. 7).

Upon arrival in Brooklyn, appellant appeared before the magistrate and was then released on his own recognizance (T. 8). He was represented at the arraignment by the Legal Aid Society (T. 9). Either before (T. 8) or immediately after arraignment (T. 87), the Assistant United States Attorney to whom the case was initially assigned met with appellant and again gave him his *Miranda* warnings and attempted to obtain appellant's cooperation (T. 8, 87).³ The Assistant informed appellant that he could make no promises, except to bring any cooperation on appellant's part to the attention of the sentencing judge (T. 28, 87).

After the appearance before the magistrate, Agent Rogers took appellant to the marshal's office for further processing. Upon leaving the marshal's office, Rogers

³ The recollections of Agent Rogers and the Assistant U.S. Attorney differ as to when this meeting took place. Agent Rogers recalled that the Assistant U.S. Attorney spoke with appellant before the appearance before the Magistrate and that upon learning Rondello's true identity appellant indicated that he wanted to cooperate (T. 8). The Assistant U.S. Attorney testified that he met with appellant and his assigned counsel after the appearance before the Magistrate and told them he understood that appellant wanted to cooperate with ATF (T. 87).

spotted his partner, and the agents offered to drive appellant home to Nassau County (T. 8). On the way, Agent Rogers again asked appellant to cooperate by revealing the sources of the guns he had sold, and when he received an affirmative response, it was agreed that appellant would come to the ATF offices the next day at 10:00 a.m. (T. 10-11).

The following morning appellant appeared at Rogers' office in Mineola and Rogers proceeded to question him about the source of the five guns so that he could determine whether the suppliers of the guns were in violation of federal law (T. 12).⁴ Appellant then told Rogers where and when he had acquired the guns, explaining that one of the guns had been purchased legally. Appellant stated that he purchased one gun legally in Vermont in 1967, one gun at a gun show in Syracuse in 1976, two guns from Victor Accedino in Syracuse in 1974 and one gun from Accedino at a gun show in upstate New York in October 1976. Rogers questioned appellant about other possibly illegal firearms transactions in the metropolitan area of which he might have knowledge (T. 13). Again Rogers explained that he could make no promises to appellant other than to inform the United States Attorney of the value of his cooperation (T. 28-29). Thereafter, although appellant made some attempts to assist ATF agents, nothing resulted from his cooperation (T. 43).

At the hearing, appellant testified that when he was brought to Brooklyn, he was taken to see an Assistant U.S. Attorney, who told him that his cooperation could help him a great deal (T. 56), and that he was there-

⁴ Rogers did not, at this point, advise appellant of his constitutional rights (T. 14).

However, Rogers did not question appellant about the sales of the guns except to ask where the appellant had obtained the weapons (T. 13).

after taken before a magistrate, who gave him his *Miranda* warnings; appellant claimed that this was the first time he had been given his rights (T. 58). Appellant confirmed that after the Magistrate proceedings the agents offered to drive him home, and that he voluntarily went with them (T. 59). Appellant also stated that he agreed to talk with Agent Rogers in the ATF office the next morning about the source of the weapons he had sold (T. 60-61). He testified that Agent Rogers promised him that whatever he said would be "off the record" and strictly confidential (T. 61-62).

Appellant also testified about several promises which allegedly were made to him concerning the disposition of his case. He stated that a week or ten days after arraignment, his assigned counsel told him that cooperation, if he wished to give it, was "the right thing to do", and he told appellant that there would be a deferred prosecution in his case (T. 72).⁵ However, appellant testified that he had not received any promises of "no prosecution" until December 1976, when an ATF agent from Syracuse promised him total immunity if he would testify against one of the men who sold him three of the guns he in turn sold to Rondello (T. 67-69).⁶

At the close of the hearing, Judge Platt denied appellant's motion to suppress the statements and found that the statements were voluntarily made. The court found that appellant received his *Miranda* warnings three times on the day of his arrest, that he voluntarily accepted the

⁵ The Assistant U.S. Attorney who had taken appellant before the magistrate testified that he had never promised appellant that he would not be prosecuted if he cooperated (T. 88, 94). He further testified that appellant's retained counsel requested both deferred prosecution and a misdemeanor, and that both requests were refused (T. 90, 101).

⁶ In any case, appellant was never asked to testify against the Syracuse gun supplier (T. 70).

ride from the agents and voluntarily went to the ATF office the next day, having had an opportunity to reflect on the matter overnight and that he was not in custody at the time he gave his statements (T. 102-103). The court further rejected the claim that appellant had been offered immunity, finding that no immunity of any kind had been offered, such claim being "wholly false and untrue" (T. 103-104).⁷

ARGUMENT

POINT I

The District Court properly denied the motion to suppress.

Appellant alleges, for the first time on appeal, that the statements he gave to Agent Rogers should have been suppressed on the grounds that they were obtained in violation of due process requirements, the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel. He further alleges, as he did below, that his statements were involuntary. These contentions are wholly without merit.

I.

First, relying on *United States v. Mallory*, 354 U.S. 449 (1957), *McNabb v. United States*, 318 U.S. 332 (1943), and *Watson v. United States*, 249 F.2d 106 (D.C. Cir. 1957), appellant claims that his appearance before the magistrate was unduly delayed and that he was not advised of his right to counsel before being brought to see an Assistant United States Attorney. The short an-

⁷ Appellant has abandoned on appeal his claim that he had been promised immunity.

swer here, of course, is that appellant made no statement at all between his arrest and appearance before the magistrate, other than agreeing to think about cooperation. Nor was he asked to make any statement about the crime. Thus, there is no statement from this period, no fruit of the delay, to be suppressed. In any case, appellant's allegations about his treatment during this period are unsupported by the record.

Appellant was arrested at approximately 11:00 A.M. on October 27, 1976 (T. 10), was brought directly to Nassau County police facilities for fingerprinting and processing, and then was brought directly to the United States Courthouse in Brooklyn and was arraigned between 3:00 and 4:00 P.M. Appellant himself testified that some of the delay was due to a bureaucratic argument between ATF agents and a Nassau County police officer (T. 51). The maximum of four hours from arrest to magistrate's appearance is not comparable to the delay described in *McNabb*, *Mallory* and *Watson*.

II.

Appellant's contention that his statements were obtained in violation of his right to counsel was not developed in the record because the claim was not raised below either in his motion or in an objection at trial. The Government has thus been denied an opportunity to demonstrate, for instance, that appellant waived his right to counsel or made the statements upon advice of counsel. Therefore, absent unusual circumstances, he has waived this claim on appeal. *United States v. Indiviglio*, 352 F.2d 276, 279-280 (2d Cir. 1965), *cert. denied*, 383 U.S. 909 (1966); *United States v. Rizzo*, 418 F.2d 71 (7th Cir.), *cert. denied*, 397 U.S. 967 (1969). Nonetheless, evidence developed below indicates that appellant was fully aware of his right to counsel, as well as his right

to not incriminate himself, and that he made an intelligent and voluntary waiver of those rights.

Appellant himself testified that after arraignment, he talked with his court-appointed counsel (T. 57) and was taken to the marshal's office by Agent Rogers. Upon leaving that office, Agent Rogers met his ATF partner and

they asked me if I wanted a lift back to Floral Park, to where I was arrested and I said, "I would appreciate it very much if you would . . ." (T. 59).

Appellant described the offer in these words:

He asked me, I thought he was kind enough to do it and I accepted the offer. (T. 59)

* * *

Yes, you could say it was voluntary. (T. 59).

By this time, appellant had been given his *Miranda* warnings three times and had talked with his lawyer.⁸ He was obviously aware that he was under no compulsion either to accept the ride or to talk to the agents about his case. Nor is there any reason to believe that the agents' offer was designed to give them an opportunity to question appellant alone.

During the ride to Floral Park, Agent Rogers again solicited the cooperation of appellant and made an ap-

⁸ The Assistant U.S. Attorney who first spoke to appellant testified that he told the appointed counsel that his client wanted to cooperate. There is thus some reason to believe that appellant had already made up his mind to cooperate and that he made the appointment with Rogers so that he would be in a better position in his case. See *United States v. Messina*, 507 F.2d 73 (2d Cir. 1974), cert. denied, 420 U.S. 993 (1975).

pointment with him for the next day. As the court found, appellant appeared at the ATF office the next day voluntarily, having had an opportunity to reflect upon his alternatives, and he "proffered his services." (T. 103). And it was only at that point that Rogers questioned him about *where he had acquired the guns*. Rogers testified that the purpose of seeking this cooperation was to obtain information about other persons violating the Gun Control Act, not to obtain incriminating statements (T. 12-13). In fact, the greater part of the conversation seems to have concentrated on what benefits cooperation would confer and what would be expected of appellant in this regard (T. 13-14, 29-31).

Concededly, the conversation between Rogers and appellant at this point occurred at a time when appellant's Sixth Amendment right to counsel had attached. *Brewer v. Williams*, --- U.S. ---, 97 S.Ct. 1232 (1977). However, this is not a case where statements were deliberately and secretly elicited from a defendant without the knowledge of his attorney. Cf. *Massiah v. United States*, 377 U.S. 201 (1964). Moreover, the right to have counsel present can be waived by a defendant without notice to counsel. *Brewer v. Williams*, *supra*, at 1243.⁹ In the instant case, where no claim of coercion has been made, and where the record reflects that appellant received three sets of *Miranda* warnings, conferred with counsel after arraignment and presumably knew he could call upon him for advice, and went in voluntarily to cooperate, we submit that a showing that appellant knowingly and voluntarily waived the right to have counsel present has been made. See also, *United States v. Garcia*, 377 F.2d 321, 324 (2d Cir.), *cert. denied*, 389 U.S. 991 (1967)

⁹ The Court in *Brewer* did not set out any new standard by which to judge an effective waiver, but merely cited several lower court cases. The holdings in these cases seem to require a case-by-case analysis and a totality-of-the-circumstances approach, as discussed in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

holding post-arrest incriminating statements admissible if volunteered and not deliberately elicited by direct interrogation or surreptitious means.

Similarly, an analysis of the totality of the circumstances surrounding appellant's statements reveals that they were voluntarily made and that he had knowingly and intelligently waived his Fifth Amendment right to not incriminate himself. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *United States v. Mullens*, 536 F.2d 997 (2d Cir. 1976).

III.

Appellant also claims that he was tricked into telling Rogers about the source of the guns because Rogers falsely lead him to believe that those statements would not be used against him. Thus, he claims his statements were involuntary. However, both Rogers and the Assistant United States Attorney who spoke with appellant about cooperation repeatedly testified that the only promise made to appellant was to bring any cooperation to the attention of the sentencing judge. By denying appellant's motion after hearing his testimony in support of his claim, the court impliedly found that no promise had been made by Rogers to not use the statements against appellant. Moreover, statements made in the hope of obtaining judicial leniency, as in this case, are not involuntary because they are motivated by such a hope. *United States v. Drummond*, 354 F.2d 132, 149 (2d Cir. *en banc* 1965), *cert. denied*, 384 U.S. 1013 (1966).

IV.

Appellant further argues that the statements elicited from him were the fruits of an illegal arrest. Although this claim was not raised below and therefore should be deemed waived on appeal, the record demonstrates that

the contention is meritless. Appellant alleges that the statute which he was accused of violating proscribes engaging in the business of unlicensed dealing in firearms and that the affidavit in support of the warrant alleged only one sale. He claims that the sale of only one gun does not constitute a violation of that statute and that the Government questioned appellant after arraignment under the guise of seeking cooperation in order to gather evidence about other sales and thus be able to prove more than the one sale alleged in the affidavit. Obviously, this theory ignores the fact that at the time of the questioning, the Government already knew about the other two sales, about which there was testimony at trial, because the sales were made to its own agents. It also does not explain why the agents did not simply seek a waiver of appellant's constitutional rights at the time of his arrest and then, pursuant to such waiver, try to obtain a total confession, rather than merely statements about the source of the guns.

In any case, the arrest warrant was validly issued. An affidavit in support of an application for an arrest warrant need only allege probable cause to believe the defendant committed the crime charged; the affidavit need not allege enough for a conviction. *United States v. Ventresca*, 380 U.S. 102 (1965); *Wong Sun v. United States*, 371 U.S. 471, 479 (1963). And evidence of one sale plus arrangements for future sales has been held sufficient to sustain a conviction under this statute. *Kaneshiro v. United States*, 445 F.2d 1266, 1268 (9th Cir.), *cert. denied*, 404 U.S. 992 (1971). Therefore, it is axiomatic that an allegation of one unlicensed sale of a gun would constitute probable cause and would justify issuance of a warrant.

Finally, the statements used at trial, detailing where and when appellant acquired the guns he sold to the agents, in the context of the trial, are not inculpatory. During his testimony, appellant did not deny selling the

guns. In fact, he testified about the sources of the guns he sold as part of his entrapment strategy. His version of where he got the guns differed from Agent Rogers' testimony only in insignificant aspects. It is difficult to see how the testimony in the Government's case about his statements prejudiced or harmed him in any way.

POINT II

The Government met its obligation to make the informant available.

As noted above, Kenneth Wilson, a registered informant, gave Agent Rogers information to the effect that appellant had guns to sell, and Wilson arranged a meeting at which Agent Rondello was to purchase two guns. Wilson was present during that meeting and asked appellant whether he could "do better" on the price of the guns (T. 120). Wilson was not present at any of the subsequent sales. Prior to trial, appellant was given the name and address of the informant and was told that the Government did not plan to call him as a witness. Appellant himself thereupon subpoenaed Wilson.

Now, on appeal, appellant claims that despite the fact that he was provided with the information about the informant sufficiently in advance of trial to enable him to serve a subpoena, the court erred in denying his earlier pre-trial motion for the identity and address of any informant. He further claims that the government was obliged to call the informant as its witness in its direct case.

Although the informant was not in the Government's control, and the Government therefore had no obligation to produce him, the prosecution plainly assisted appellant

in locating Wilson, thus more than meeting its obligations to reasonably assist the defense to secure the appearance of an informant known to the defendant.¹⁰ *United States v. Turbide*, — F.2d —, slip op. 4341, 4354 n.6 (Second Circuit, June 22, 1977); *United States v. D'Angiolillo*, 340 F.2d 453, 455 (2d Cir.), *cert. denied*, 380 U.S. 955 (1965). Moreover, the suggestion that the Government was trying to hide Wilson is absurd in view of the fact that appellant knew the informant by name, knew that he had been present at one of the sales and knew that he worked only a few blocks from him.¹¹

The defendant further argues that the Government was required to call the informant as its witness and complains that he was prejudiced by the Government's failure to do so. He cites *Roviaro v. United States*, 353 U.S. 53 (1957) and *United States v. Morell*, 524 F.2d 550 (2d Cir. 1975) in support of that argument. However, neither of these cases, nor any that we are aware of, requires the prosecution to call an informant in its direct case. In fact, *United States v. D'Angiolillo*, *supra*, holds to the contrary. *Roviaro* requires only that the identity of the informant be revealed where it appears that his testimony may be relevant and helpful to the

¹⁰ The informant and appellant worked only a few blocks from one another and each testified that he had known the other at the time of the sale for several months. Thus, it is apparent that the identity and whereabouts of the witness were known to appellant before, during and after the crime.

¹¹ We note in passing that appellant has made no showing that the informant's testimony would be relevant and helpful to the defense or essential to the trial, the threshold which *Roviaro v. United States*, *supra*, demands be crossed in order to require disclosure of the identity and whereabouts of an informant. In fact, the informant's participation in the transactions was minimal and the Government probably would have been entitled to withhold his identity and whereabouts. *United States v. Turbide*, *supra*, at 4855-4856. Appellant was given more information than he was entitled to under the circumstances.

defense of the accused. *Roviaro v. United States, supra*, at 62. *United States v. Morell, supra*, simply held that the identity of an informant need not be revealed where his testimony would add little to the defense case.

Appellant claims that he was prejudiced by having to call the informant as his own witness because he was not allowed to impeach his own witness. He quotes in his brief, at page 19, the court as saying "'You cannot impeach your own witness. . . ." (p. 299, Trial Transcript)". However, appellant does not include the rest of the court's ruling, ". . . even before you've got any substantive testimony." The court was not trying to preclude all impeachment, rather it was just sustaining an objection "at this point." (T. 299). In any case, when appellant made an offer of proof as to what he considered impeachment material, it became clear that the material was not even admissible. Appellant wished to elicit the fact that the informant had been arrested numerous times and had been convicted of two misdemeanors, which testimony is inadmissible under Rule 609(a) of the Federal Rules of Criminal Procedure (T. 300-303). In any case, appellant had been allowed to bring out, on cross-examination of Agent Rogers, information about the informant's arrests and criminal activities (T. 225-229).

Finally, appellant speculates that Wilson's testimony on substantive issues could have been helpful to him and implies that he was in some way precluded from presenting that information. However, appellant was given ample opportunity to discover that information before trial, and the court's ruling allowed him to question the informant about substantive matters. The failure to bring the informant's testimony before the jury was entirely appellant's own.

POINT III

The judge's conduct did not deprive appellant of a fair and impartial trial.

Appellant claims that the court took such an active part in his cross-examination that it "rendered a fair trial impossible." Appellant asserts that the tone and extent of the questioning indicated the court's disbelief in his testimony. We submit that the trial judge's questioning of appellant was well within his discretion and for the most part clarified issues which had become confused.

As this Court stated in *United States v. Curcio*, 279 F.2d 681, 682 (2d Cir. 1960), the judge has an active responsibility to ensure the fair conduct of a trial and will often have a duty to participate actively in the trial for that purpose. Moreover, the judge may elicit facts necessary to the clear presentation of the issues, *United States v. Brandt*, 196 F.2d 653, 655 (2d Cir. 1952), may clarify testimony to assist the jury in understanding the evidence, *United States v. Desisto*, 289 F.2d 833 (2d Cir. 1961), and may insure that the facts are presented in a clear and straightforward manner, *United States v. Nazzaro*, 472 F.2d 302, 313 (2d Cir. 1973). The court may interrupt examinations and ask questions himself to clarify issues. *United States v. Curcio, supra*, 279 F.2d 682. Of course, the court cannot in so doing indicate his personal opinion of the defense or defendant.

In determining claims such as the one appellant asserts, this Court has stated that it will closely scrutinize "each tile in the mosaic of the trial" to determine whether the conduct of the court indicated bias or was so improper as to deprive the defendant of a fair trial. *United States*

v. Nazzaro, *supra*, 304. When viewed in the light of the foregoing authority and in the context of the record of this case, it is clear that the judge's actions were well within his proper discretion and responsibility.

To set appellant's arguments in context, it should be noted that the court's questioning of appellant covered fewer than five of the fifty pages of cross-examination of appellant and constituted a small fraction of the questions asked of appellant by the prosecution. Although mathematical computations are not dispositive of appellant's claim, *United States v. Fernandez*, 480 F.2d 726, (2d Cir. 1973) the figures are set forth herein in order to contrast the extent of the court's participation in the instant case with that found to be so objectionable in *Fernandez*, for example, where the court's questions far exceeded the quantity of the prosecutor's questions.

Furthermore, at the time of the cross-examination of appellant, the jury had already been presented with overwhelming evidence of appellant's guilt. Agents Rondello and Galgano had testified to sales of five guns and offers to acquire a sizeable collection of other weapons. Rondello had also described appellant's instructions to wipe off fingerprints before selling the guns as well as his assurances that the guns were not traceable. Even appellant's own testimony on direct examination was inculpatory. He admitted selling guns on not three, but four, occasions. Although he claimed to have been reluctant at first to sell the guns, he seemed to have no qualms about selling the .45 caliber gun to Rondello if "Ken" did not want it. Moreover, the number of times that he sold guns as well as his purchase of guns for the purpose of selling them to "Ken" were indicative of his willingness to engage in the illicit trade. The jury had

also heard appellant admit in direct testimony that he thought these guns were going to be used by people who could not obtain licenses. With this record before the jury, it is unlikely that they would have been swayed by any indication from the judge as to his opinion of appellant's testimony. The strength of the Government's case was reflected by the fact that the jury deliberated only an hour and a half.

In many instances, Judge Platt took an active role for the sake of clarification. For example, the record of the colloquy which appellant sets out at pages 24 and 25 of his brief, concerning the bribing of a salesman by the informant, indicates that appellant did not understand the prosecutor's questions. The court intervened to explain to the defendant what information he was being asked about, which assistance apparently was well taken:

THE COURT: But, you said he did something moral [should read "immoral"] or illegally improper. . . .

A. Yes, all right now I understand what you mean.

THE COURT: And didn't he pay some salesmen to get those guns?

A. Yes.

THE COURT: So he knew salesmen and he dealt with salesmen?

A. Yes.

THE COURT: And that was the question? [should read as a statement rather than a question].

A. Okay, I'm sorry, I really didn't understand it. (T. 369-370).

At other times, the court merely sought to clarify the terms used by appellant, as for instance where the court questioned appellant about his meaning of "sale" (T. 383-384). On other occasions, the court was clarifying responses to inquiries it had made. For example:

Q. [Prosecutor] Did you ask him to fill out any Federal forms?

A. [Appellant] I'm not required to ask that either.

THE COURT: You can sell a Colt .45 to anybody?

A. As a casual sale, I can sell it to anybody or buy it from anybody, your Honor. (T. 389).

The court, after inquiring about the procedure to be used in the sale of a gun and receiving a response involving the term "casual sale" then went on to clarify, as it was entitled to do, appellant's understanding of the term (T. 389-390). This information is relevant to the issue of appellant's intent, or lack of it.

A review of the record reveals that on other occasions the court was primarily concerned in getting answers that were responsive to the prosecutor's questions so that the jury would not be confused.

Q. [Prosecutor] Mr. Forsack . . . , are you licensed to deal or to engage in the business of dealing, manufacturing or importing firearms?

A. I'm not a dealer, manufacturer or importer of firearms.

The Court: The question is, are you licensed? (T. 357-358).

Moreover, the court's impartiality is exemplified in the following exchange:

Q. [Prosecutor] Did you ever tell them that you had a connection down South that you were working on?

A. [Appellant] Down South, where?

Miss Schwartz: Your Honor, would you please instruct the witness not to argue?

The Court: He's not arguing, he said that's not true. (T. 397-398).

The Court's impatience with unresponsive answers, this time by a Government witness, was demonstrated as well during defense counsel's questioning of Agent Rogers about the evidence logs:

Q. [Defense Counsel] Which, am I correct in assuming, that the evidence log should have been prepared or signed by the person who prepared this tag, that's all I'm trying to get at?

A. [Agent Rogers] Well, once again, not necessarily. Unless your point is the changing of custody.

Q. That's apparently my point because there is some question which has arisen here, with regard to at least the first transaction.

A. Well, basically, when it comes down to it, we all share the work a little bit, we get the thing in and we want to get it into the Evidence Room.

THE COURT: He's raising the question as to whether or not on September 29, 1976, you, prior to making out these forms, received those two guns from Mr. Rondello, Agent Rondello?

A. I might have, your Honor.

THE COURT: You might have?

A. I might have, I was in the same room with him.

THE COURT: Wait a minute, let's begin out in the street. As you recall, you testified out on direct examination, that after he purchased them, he came around a corner and you met him with the two guns?

A. Yes, your Honor and I examined what was in the bag, which was the two guns, but he retained custody of——

THE COURT: And what did you do, go back to the office?

A. Back to the office, yes.

THE COURT: When were these forms prepared, this form dated September 29, 1976?

A. It was prepared on the day of the, date of the first sale, September 29.

THE COURT: Was it prepared by you or Mr. Rondello?

A. By me, your Honor.

THE COURT: Was he there with you when you prepared it?

A. Yes.

THE COURT: And then what did you do with it and the gun?

A. Well, whether I or Rondello went into the Evidence Room, we might have went in together or I might have went in alone, I don't recall.

THE COURT: But, in any event, you think those two guns, with that form, went into the Evidence Room?

A. Not with this form, just the guns went into the Evidence Room, this is maintained in our office.

THE COURT: In your office?

A. Yes.

Q. And the tag that was attached or not attached to the first two guns, but the other three, the tag would have been prepared by Agent Rondello; is that correct?

A. Yes, yes, he signed off on them.

MR. KOHN: All right, I have no further questions.

This exchange further demonstrates the court's impartiality and desire to have facts presented clearly.

Moreover, the court's conduct is clearly distinguishable from that described in *United States v. Nazzaro, supra*, for there was, in the instant case, no rehabilitation or prosecution witnesses, no acriminious exchanges with defense counsel, no disparagement of defense witnesses, no questions designed to demonstrate the improbability of the defendant's story and no questioning about irrelevant and prejudicial facts.

Additionally, appellant's counsel made no objection to any of the court's questions to his client. Failing to object at trial, appellant cannot object on appeal, except in unusual circumstances, not present here, that the court's conduct was improper.¹² *United States v. Indiviglio, supra*.

¹² Moreover, even where a judge has played "a more active role than may be desirable in most cases", a conviction should be affirmed where the judge has properly charged the jury that they are to draw no conclusions from his participation. *United States v. D'Anna*, 450 F.2d 1201, 1206 (2d Cir. 1971). In the case at bar, the trial judge specifically charged the jury to draw no conclusions from his statements or questions (T. 507).

POINT IV

The Government made out a prima facie case.

In perhaps his most frivolous argument, appellant contends that the Government did not prove his identity and further complains that the court's ruling which would have allowed the Government to reopen its case was an abuse of discretion.

At the close of the Government's case, appellant asked the court to dismiss the indictment because the Government had failed to prove that the Stanley Forsack from whom the agents had bought the guns was the defendant at bar. As the court, and defense counsel himself, noted, there was no question of identity raised until that point (T. 283-284).¹³ Appellant, neither in his pre-trial motions nor in his opening to the jury, had contested the fact that he was the Stanley Forsack named in the indictment. Indeed, the defense relied on claims of lack of criminal intent and entrapment as defenses and never contested identity in any way. Clearly the issue was not who committed the crime but whether a crime had been committed at all.

When the court offered to allow the Government to reopen the case, appellant, apparently realizing the claim was frivolous, withdrew his objection and presented the defense case (T. 285). Appellant therefore, absent plain error, has waived his right to object on appeal to either

¹³ Although no government witness had been asked to identify the defendant, the Assistant United States Attorney represented to the court that she had seen Agent Galgano point to the defendant when he mentioned "Stanley Forsack" (T. 283).

the lack of proof or the court's ruling. *United States v. Indiviglio, supra*. Moreover, it can hardly be said that allowing the Government to reopen its case for the purpose of proving a fact which was inadvertently omitted and which the defendant admits he never contested constitutes an abuse of discretion. *United States v. Williams*, 336 F.2d 183 (2d Cir. 1964), *cert. denied*, 379 U.S. 857 (1964); *United States v. Glass*, 421 F.2d 832 (9th Cir. 1969). Additionally, once the defendant puts evidence into the case which cures the defect, he is deemed to have waived his claim as to sufficiency of the evidence based on the Government's case alone. The entire record will then be considered for any sufficiency claim on appeal. *United States v. Coblenz*, 453 F.2d 503 (2d Cir.), *cert. denied*, 406 U.S. 917 (1972). In the instant case, appellant's own testimony, in which he admitted selling the guns to the agents, cured any defect as to proof of identity.

Finally, we are at a loss to understand appellant's claim that the alleged failure to prove identity deprived him of an opportunity of cross-examine the ATF agents as to the source and means of their identification of appellant (Appellant's Brief, pp. 30-31). Each of the agents testified on direct examination about face-to-face transactions and conversations with appellant. The basis of their identification could not be clearer.

POINT V**The Government produced the evidence logs demanded by appellant.**

Appellant accuses the Government of having concealed certain evidence logs, whose production he orally demanded at trial. He claims that the failure to produce these logs deprived him of an opportunity to corroborate his story by independent evidence. The record, however, does not support this claim.

Agent Rondello testified that when guns are taken into custody, an evidence log is filled out, detailing the investigation number, description of the evidence, the person who entered the evidence into the Evidence Room, and the custodian of the Evidence Room (T. 149). When Agent Rogers testified, appellant did not cross-examine him about the evidence logs but merely asked him over luncheon recess to produce them the next day (T. 252).

Agent Rogers was called at the end of appellant's case to explain the contents of the documents which he had produced in response to the above request. He produced copies of three property reports (Defendant's Exhibit D). These documents contain spaces, as Agent Rondello had stated, for the investigation number, the description of the property, the name of the Special Agents entering the evidence and the signature of the storage recipient. Entries were made in each of the applicable spaces with the exception of the storage recipient's signature.

Agent Rogers explained that the documents which he produced were the copies of evidence logs prepared for the five guns purchased from appellant (T. 410). He testified further that there is a separate record, an *entry*

log, maintained for the Evidence Room, which contains the signature of the entering agent, what investigation he is working on and for what purpose the investigation is being conducted (T. 415). Clearly, Agent Rogers acted in good faith and produced the documents he believed appellant sought. Indeed, he produced the documents which reflected the date the guns were first taken into ATF custody, which was the issue with which appellant was concerned.

Appellant never demanded the production of any other document, including the Evidence Room entry log, the item he now claims should have been furnished. Indeed, after questioning Agent Rogers about the various types of evidence records maintained and who prepares each of them, he stated that he had no further questions and, after one question to Rogers from the Government, appellant rested his case. The record clearly indicates that Agent Rogers complied in good faith with appellant's demand for production of the logs.¹⁴

¹⁴ Appellant contends that the "missing" evidence logs would prove that his first sale of a gun took place before September 29th and that only one weapon was sold on September 29th. It is doubtful that the Evidence Room entry log would support this contention in view of the fact that the evidence logs (Defendant's Exhibit D) indicate that 2 guns were taken into custody by Rogers on September 29th and Rogers testified that he first received money to purchase guns on September 28th (T. 250).

POINT VI

The evidence was more than sufficient to support the jury's verdict.

Appellant lists as an issue presented for determination on appeal the question, "Was the jury verdict against the weight of the evidence?" (Appellant's Brief, p. 12). He states, by way of explanation, that he was entrapped as a matter of law. Although appellant does not develop this point in the argument section of his brief and cites no cases to support this conclusion, the Government will respond to the allegation.

Appellant did not claim below that he had been entrapped as a matter of law. The court nevertheless gave the standard entrapment charge, along with a charge requested by the Government, which appellant specifically agreed was acceptable. (T. 421-424). In the instant case, therefore, appellant must concede that the jury was correctly charged. Even when a defendant claims on appeal that he was entrapped as a matter of law, where there is at least some evidence of an inducement and where the jury has been correctly charged, the conviction should be reversed "only if the Court is convinced that the evidence of predisposition was too scanty to support a conviction by reasonable jurors." *United States v. Steinberg*, 551 F.2d 510 (2d Cir. 1977).

In the instant case, the evidence of appellant's predisposition was substantial. Agent Rogers testified that the informant had told him that he had heard that appellant was engaged in illegal trading of guns (T. 233). The informant then had a conversation with appellant in which appellant mentioned that he had guns available (T. 235, 241). At that point, Agent Rogers asked the

informant to introduce an ATF agent, who would be working undercover, to appellant (T. 241). Thereafter, the informant arranged to bring the agent to the store where appellant worked on September 29, 1976, to purchase two guns (T. 249). At that meeting, the only hesitation appellant had in selling the guns was his fear of being "set-up." This evidence establishes that appellant merely responded to a solicitation by the informant and was not induced to engage in illegal conduct. *United States v. Barash*, 412 F.2d 26 (2d Cir.), cert. denied, 396 U.S. 832 (1969).

Moreover, appellant demonstrated his familiarity with the illicit gun trade when he instructed the agent to wipe off the fingerprints from the guns before selling them and when he assured the agents that the guns were not traceable. Appellant's sales on not just one but three different occasions and his purchase of weapons to sell to the agents are also indicative of predisposition. Furthermore, appellant's offer to supply types of guns ranging from .22 caliber pistols to an M2 machine gun, as well as his statement that he was "working on a connection", support the contention that appellant was not only predisposed to deal in guns but was ready, willing and even eager to do so. Even appellant's own testimony in which he stated that he was willing to sell a .45 caliber gun to Agent Rondello if the informant did not want the gun belies his contention that he was entrapped.

Finally, on cross-examination, appellant corrected the testimony of the agents who had said that he told them illegal guns were more expensive than legal guns. He stated that guns are, in fact, more expensive if purchased legally (T. 384). Such a statement could only be made

by one who was familiar with the business of illegal gun trading.¹⁵

CONCLUSION

The judgment of conviction should be affirmed.

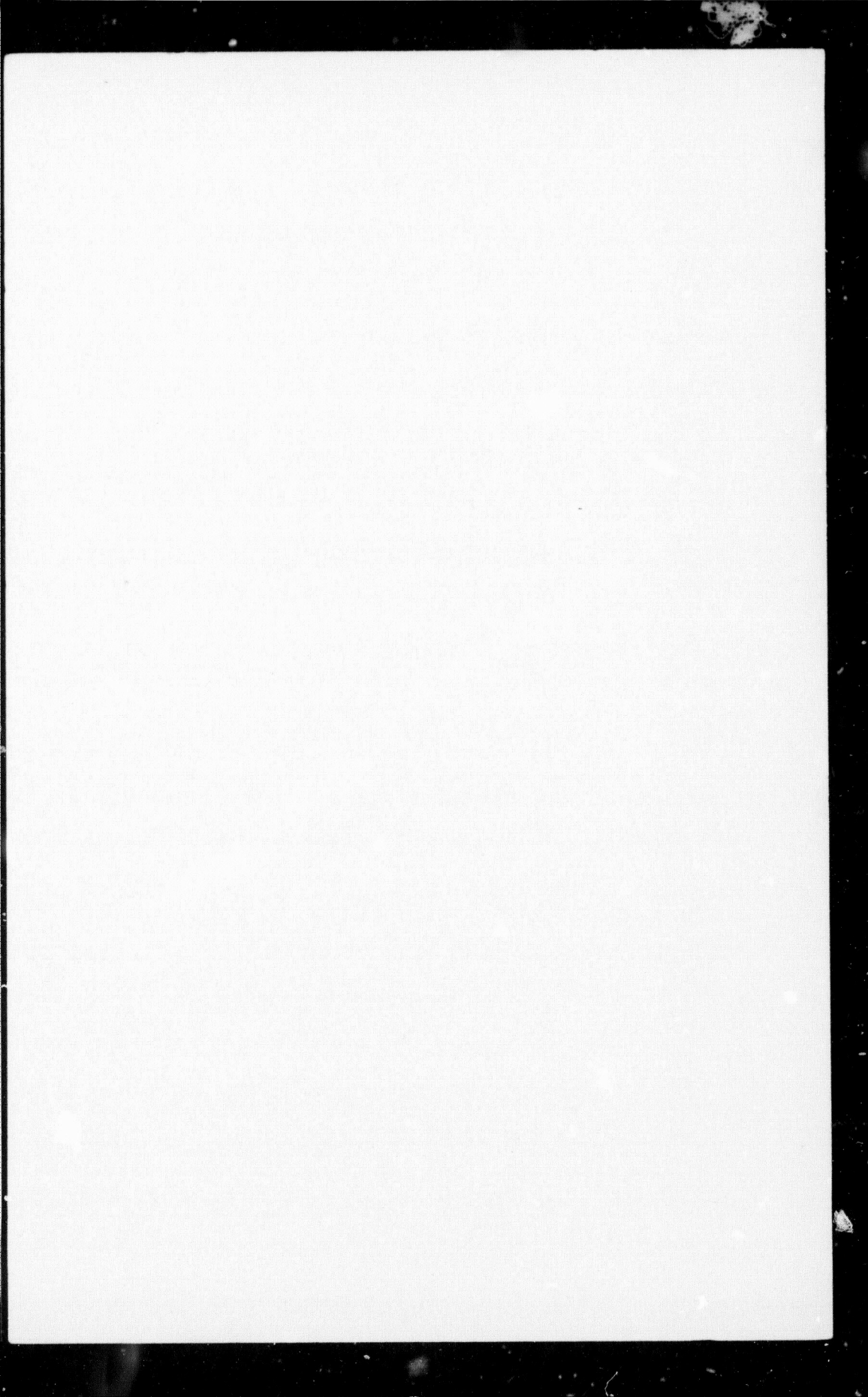
Dated: Brooklyn, New York
September 9, 1977

Respectfully submitted,

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¹⁵ Although the Supreme Court has not yet determined whether outrageous conduct by Government agents in entrapment cases should result in reversal regardless of the defendant's guilt, the conduct of the Government agents and informant in this case is well within the bounds of proper conduct. *See, United States v. Russell*, 411 U.S. 423 (1973); *United States v. Neal*, 536 F.2d 533 (2d Cir. 1976), *cert. denied*, — U.S. —.



AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

_____ Dolores Byrd _____ being duly sworn,
deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 12th day of Sept. 19 77 he served a copy of the within
_____ Brief for Appellee _____
by placing the same in a properly postpaid franked envelope addressed to: _____
_____ Roger W. Kohn, Esq. _____
_____ 21 East 40th Street _____
_____ New York, N.Y. _____

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this

12th day of Sept. 1977

Barbara A. Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979